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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVENUE CORPORATION,
Petitioners,

against

PAUL A. PORTER, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS, AND BRIEF

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September 20, 1946

CONTENTS

	PAGE
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS	1
Opinions Below	1
Statute Involved	1
Jurisdiction	2
Questions Presented	2
Statement	2
Specification of Errors to be Urged	11
Reasons for Granting Writ	11
Conclusion	13
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI	14
I. The Emergency Court of Appeals erred in interpreting the Emergency Price Control Act as authorizing the Price Administrator to establish maximum rents which prevent the rental housing industry in a defense-rental area from receiving a fair return on its investment	14
II. The Emergency Price Control Act, as interpreted by the Emergency Court of Appeals, violates the Fifth Amendment to the Constitution	25
Conclusion	27
Appendix—Pertinent Provisions of the Emergency Price Control Act of 1942 and of the Price Control Extension Act of 1946	28

AUTHORITIES

CASES: PAGE

Bowles v. *Willingham*, 321 U. S. 503 (1944) 26, 27

Chatlos v. *Brown*, 136 F. (2d) 490 (1943) 17

Equitable Trust Co. v. *Bowles*, 143 F. (2d) 735 (1944) 17

Madison Park Corp. v. *Bowles*, 140 F. (2d) 316 (1943) 17

People ex rel. Parklin Operating Corp. v. *Miller*, 287 N. Y. 126 (1941) 19

Power Commission v. *Hope Natural Gas Company*, 320 U. S. 591 (1944) 15

Wilson v. *Brown*, 137 F. (2d) 348 (1943), 22, 23, 24, 25, 26, 27

STATUTES:

Emergency Price Control Act of 1942 1

Natural Gas Act of 1938 15

Price Control Extension Act of 1946 14

New York Mortgage Moratorium Acts:

New York Laws of 1933, Chapter 745 18

New York Laws of 1939, Chapter 524 18

MISCELLANEOUS:

Hearings Before Committee on Banking and Currency, H. of Rep., 77th Congress, 1st Session, on H. R. 5479 (superseded by H. R. 5990) 16

Hearings before Committee on Banking and Currency, H. of Rep., 78th Congress, 2nd Session, on H. R. 4376 22

House of Representatives, House Report No. 1409, 77th Congress, 1st Session 16

New York Insurance Report (1940), Vol. I 19, 20

PAGE

New York Legislative Document (1938), No. 58.. 18

New York Legislative Document (1942), No. 45.. 20

New York Herald Tribune, August 27, 1946..... 12

Rental Housing Operation Under Rent Control in Thirty-Six Cities, 1939-1944, Office of Price Administration Financial and Statistical Analysis Branch, Rent Department, January 1946..... 22

Rent Regulation for Housing in the New York City Defense-Rental Area, 8 F. R. 13914..... 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled cause on August 23, 1946.

Opinions Below

The opinion of the United States Emergency Court of Appeals on rehearing (R., Opinion on rehearing) is unreported as yet. The opinion of said Court on the original hearing, filed June 25, 1945 (R., Opinion), is also unreported.

Statute Involved

The statute involved is the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, as it relates to control of rents for housing accommodations. The text of provisions of the Act which are most pertinent to the questions presented herein is quoted in the Appendix.

Jurisdiction

The judgment of the United States Emergency Court of Appeals sought to be reviewed was entered on August 23, 1946. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942 (56 Stat. 23).

Questions Presented

1. Does the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, in authorizing the Price Administrator to establish maximum rents which "will be generally fair and equitable" permit the Administrator to establish maximum rents which prevent the rental housing industry in a defense-rental area from receiving a fair return on its investment?

2. If the Emergency Price Control Act be interpreted as authorizing the Price Administrator to establish maximum rents which have such effect, does the Act, to that extent, violate the Fifth Amendment?

Statement

The Respondent, Price Administrator, issued the "Rent Regulation for Housing in the New York City Defense Rental Area", hereafter referred to as the "Rent Regulation", on October 8, 1943, to be effective November 1, 1943. The Rent Regulation established March 1, 1943, as the maximum rent date (R. Tr.* Part I, 1; Tr. Part II, 217). Petitioners are the owners of housing accommodations rented to tenants and located in New York City, and they are therefore subject to the provisions of the Rent Regulation (R. Tr. Part II, 217). On December 7, 1943, three** of Petitioners filed their joint protest against the Rent Regulation (R. Tr. Part I, 1-46). The joint protest was sponsored by the Metropolitan Fair Rent Committee, a

*"Tr." refers to printed Transcript of Proceedings Before the Price Administrator.

**The fourth petitioner, 1165 Park Avenue Corporation, owner of an apartment building in which average unit rents are over $100 per month, was added as an additional complainant by order of the Emergency Court of Appeals on February 1, 1946 (R., Court order of Feb. 1, 1946).

voluntary association of owners and agents of owners of housing accommodations in the New York City Defense-Rental Area (R. Tr. Part I, 2). The objections to the Rent Regulation which were made in the protest appear therein (R. Tr. Part I, 2-4), and were in substance that the Rent Regulation was not in accordance with law and was arbitrary and capricious, for the reason that the maximum rents established thereby, unless adjusted by percentage increase of 10%* of such maximum rents, are not generally fair and equitable within the meaning of the Emergency Price Control Act. On August 30, 1944, the Respondent, Price Administrator, issued an order, with accompanying opinion, denying the protest (R. Tr. Part II, 215, 224-261).

On September 29, 1944, the three Petitioners filed their complaint in the United States Emergency Court of Appeals under Section 204(a) of the Act. The answer of the Respondent, Price Administrator, was filed on October 17, 1944. On June 25, 1945, the Emergency Court of Appeals entered judgment setting aside the Rent Regulation in part, unless within thirty days the Administrator modified the Regulation as directed by that Court. The Court held that, on the face of the statistics for the industry as a whole, the Rent Regulation was invalid because it prevented landlords generally from realizing their pre-war net return. It held further, however, that, of the three major categories into which it divided the housing accommodations of the Area, only the so-called luxury type, with rents of $100 a month and up, had been adversely affected by reasons attributable to rent control. It accordingly concluded that the maximum rents need be increased only with respect to that class.**

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*Subsequently in the proceedings the percentage increase requested was raised to 15%.

**As to the other two categories, the Court held that, as to accommodations with average rentals below $30 a month, their depression was attributable to lack of demand rather than to control of rents; and that, as to the so-called competitive class, with average rentals between $30 and $99 per month, their net returns compared favorably with prewar returns.

By *ex parte* orders dated July 9, 1945, the Emergency Court of Appeals, on motions made by Respondent July 5 and 7, 1945, vacated that judgment, restored the case to the calendar for rehearing, and gave Respondent leave to introduce additional evidence directly to the court. Subsequently, Petitioners were likewise granted leave to introduce additional evidence; and both parties did so.

On November 30, 1945, the Price Administrator issued an order reopening the underlying protest proceedings in the case (Docket No. MRD-NY-7-P). Petitioners' motion to the Emergency Court to require the Administrator to withdraw such order was denied by it on January 11, 1946; and on March 20, 1946, Respondent issued a supplemental opinion reaffirming his order of August 30, 1944, denying the protest (R. Supp. Tr.,* Part II, 51-64).

On August 23, 1946, the Emergency Court of Appeals rendered its opinion on the rehearing and entered its judgment, now sought to be reviewed, dismissing the complaint (R., Opinion and Judgment on Rehearing).

This case has been treated by the Respondent, Price Administrator, as a test case on the application of the Rent Regulation to New York City. The New York City Defense-Rental Area consists of the five boroughs of New York City (Manhattan, Bronx, Brooklyn, Queens and Richmond) and the counties of Nassau and Suffolk (R. Tr., Part II, 1). Nassau and Suffolk counties are, however, of slight concern to the issues litigated. In 1940 the Area had a population of 8,059,098, of which 7,454,995 was in New York City, and 92% of the dwelling units in the Area were in New York City (R. Tr., Part II, 4, 60).

The evidence in the case, apart from general economic and real estate data, consists largely of a survey conducted by the Metropolitan Fair Rent Committee on behalf of Petitioners and a series of surveys conducted by Respondent. Respondent's surveys consisted of successive studies of

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*"Supp. Tr." refers to the printed Supplemental Transcript of Proceedings Before the Price Administrator.

operating income and expenditures of some 50,000 dwelling units in New York City for the calendar years 1939 through the consecutive periods of the surveys. Since there was little difference in the results reflected by such surveys, Petitioners have been content to accept Respondent's surveys as the basis of discussion throughout the proceedings.

From the beginning of the proceedings, Petitioners have taken the position that the Emergency Price Control Act requires that maximum rents, to be generally fair and equitable in a given defense-rental area, not only must permit industry-wide net operating income equal to that of the last prewar base year, but that they must also permit reasonable return on the industry-wide investment. At the original hearing the only evidence which Petitioners were able to submit on the question of industry-wide return on investment in New York City was that of return on assessed valuations. The Administrator did not take sharp issue with Petitioners on the proposition that maximum rents should permit a reasonable industry-wide return on industry-wide investment, but did contend that assessed valuation was not a proper basis for the ascertainment of return on investment.

The Court below held in its original opinion, dated June 25, 1945, that assessed valuations could not be treated as the equivalent of present fair value or original investment and stated:

> "* * * The complainants have thus failed to show either the original investment in or the present fair value of the rental properties subject to the regulation. Since the burden was upon them to do so we cannot hold that the regulation is not generally fair and equitable because it prevents the rental industry generally from realizing a fair return upon one or the other of those bases."

The Court thereupon determined the case at that juncture on the basis of comparing net operating income of the three segments into which it divided the industry for the year

ended June 30, 1944 (after eight months of rent control) with that of the base year 1939.*

On the rehearing Petitioners submitted substantial evidence on the question of fair return on investment. Petitioners obtained the actual book investment figures of *each* of the properties covered by the Administrator's latest survey renting for $100 or more and the actual book investment figures of a representative group of properties covered by the Administrator in such latest survey renting for less than $100. Petitioners also obtained similar figures of additional representative properties in the $100 and over group as a test check against the Administrator's survey. Actual book depreciation was obtained where available and where not available the cost of the *building* was depreciated at the rate of 3% for each year from date of acquisition to 1944 (R. Supp. Tr., Part I, 23-26). Petitioners also obtained the appraised valuations of all buildings refinanced or newly financed during the first half of 1945 and the sale prices of all buildings sold in the open market during the fiscal year, July 1944 to July 1945 (R. Supp. Tr., Part I, 27-30).

Applying ratios obtained from such representative samplings to the entire survey of the Administrator, the returns on original investment, on investment depreciated to 1944, on appraised value and on sales price were obtained (R. Supp. Tr., Part I, 26, 28, 30). This evidence indicated that the returns of the housing industry in New York City as a whole were grossly inadequate, and that apartment buildings in the category having average rents of $100 or more per month were operating at substantial deficits (R., Supp. Tr., Part I, 32, 35; Supp. Tr., Part II, 43-45, 49).

The return after depreciation and interest for the calendar year 1944 for the rental industry as a whole in New

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*The Administrator contended that the base period should be the average of 1939-1940, but the Court rejected this contention in both of its opinions.

York City, based on the Administrator's June, 1945, survey, was as follows (R. Supp. Tr., Part I, 31; Supp. Tr., Part II, 43):

% RETURN AFTER DEPRECIATION AND INTEREST

	On Assessed Value	On Original Investment	On 1944 Investment	On Appraised Value	On Sales Price
Total for New York City ..	.98%	.81%	1.05%	.97%	1.21%

If it be assumed that the properties bore mortgages equal to two-thirds of their value, so that the landlords' equity was one-third of the total value, the return to landlords as a whole on 1944 investment was 3 x 1.05% or 3.15%. Even on sales price, where the base would be low because the price would simply reflect what buyers are willing to pay in the poor apartment house real estate sales market prevailing in New York City, the return was only 3 x 1.21% or 3.63%.

On apartment buildings whose average rents were $100 per month or more, the return, after interest and depreciation, for the calendar year 1944, based on every building in such category actually surveyed by the Administrator, together with additional representative buildings surveyed by Petitioners, was a *deficit*, as follows (R. Supp. Tr., Part I, 34-35; Supp. Tr., Part II, 49):

% RETURN AFTER INTEREST AND DEPRECIATION

Rent Group	On Assessed Value	On Original Investment	On 1944 Investment	On Appraised Value	On Sales Price
$100 and over group for New York City.....	—2.80%	—2.31%	—3.09%	—2.75%	—2.82%

Here, again, since these returns are based on the entire value of the property and the landlord's equity can be assumed to be approximately one-third of the entire value, the loss percentage of the landlords in the $100 and over group would be three times the above-stated figures, or a deficit of over 9% per annum on 1944 investment.

Just prior to the last hearing in the Emergency Court of Appeals, Respondent offered in evidence a further survey of apartments in the $100 and over group through the

calendar year 1945. (April, 1946, survey of "luxury" apartments, R., Additional Evidence Filed April 30, 1946.) This survey showed almost no change in return on investment, the deficits for 1945 being substantially as great as those for 1944.

The Court below found that Petitioners' evidence on return on investment, "while not wholly satisfactory, tends to show original cost and present value of a representative group of properties". The Court stated that it had "accordingly given full consideration to this contention", i.e., the contention that the maximum rents as fixed by the Regulation must not prevent a reasonable return on investment.

However, the Court in its opinion on rehearing rejected this contention and concluded:

> "* * * It is true that we have stated that the statutory standard contemplates that maximum rents must provide landlords with profits reasonably calculated to sustain the industry. But we have indicated that the criterion to be used in making this determination is whether the net return* of the rental housing industry under the regulation is at the level enjoyed in the most recent period in which rents had not been influenced by defense activities. We think that this is all that the act requires * * * and that the Administrator * * * is not * * * under the duty to fix maximum rents at a level which would assure to landlords generally a [adequate] fixed rate of return on their investment."

As we shall show, in the brief attached to this petition, the year 1939 was itself a year of depressed net income

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*The phrase "net return", as used by the Court below in the sentence above quoted, evidently means net operating income before interest and depreciation. It is the rental income minus operating expenses, with no allowance for fixed charges, and is in no way related to return on investment. Thus the word "return" is not used by the Court below in the dictionary sense of "the rate of yield" and is therefore not to be confused with Petitioners' use of the word to express the rate of return on investment.

in the rental housing industry in New York City, a year in which that industry was unable to earn an adequate return on its investment; and conditions in New York City in that respect differed radically from those obtaining in the generality of cities in the country.

The returns which we have above summarized were the maximum indicated by any evidence in the record. They were based upon the figures in Respondent's own latest surveys, without adjustment or correction in ways that Petitioners contended they should be. Had Petitioners' contentions for their adjustment been accepted by the Court, the returns of the industry as a whole would have been far lower and the deficits of apartments in the $100 and over monthly rent range would have been even greater.*

The first of these contentions was that Respondent's surveys were not properly weighted. While the number of units surveyed (about 4% of the total) was adequate quantitatively, the sample contained too large a proportion of units in the middle or competitive category, renting from $30 to $100 per month, which had fared best during the war emergency, and too small a proportion of the over $100 and under $30 groups in which the operating results were comparatively unfavorable (see 1940 Census of Housing (R., Tr. Part II, 169-170; 164) for correct distribution of housing accommodations among the various rent ranges). 79.3% of the units in Respondent's November, 1944, survey were in the $30-$100 rent range as against only 66.6% according to the Census; the number of units in the under $30 group in the survey was 40.5% less than that indicated by the Census, and in the over $100 group nearly 18.4% less (R., Exhibit 5 of Affidavit, B. H. Woodward, January 29, 1945). The Court below held that, whatever might be the "theoretical advantage in achieving ideal statistical

*It should be noted that these contentions were not considered by the Court on the question of net return since the Court rejected the requirement of net return on investment as a matter of law. The Court's consideration of these contentions related only to the question of net operating income.

accuracy, * * * the weighting advocated by the complainants would not aid in determining the question for decision * * *".

Petitioner's other contention was that the figures of operating expenses in Respondent's surveys made no allowance for deferred maintenance. Respondents' June, 1945, survey showed that in 1944 the landlords spent for repairs and maintenance only 85% of what they had spent in 1939, despite the fact that prices of maintenance materials in New York City rose 25% and cost of labor 23.9% between 1939 and 1944, so that landlords were actually spending 35% less for these purposes than in 1939. They also showed that refrigerators, stoves and the like which were being replaced currently up to 1939 were not being replaced in 1944, with the result that, when these items again became available, landlords would face tremendous cumulative items of expense having no counterpart in the war years. The Court below agreed that there doubtless had been some deferment of essential maintenance work during the war period and to the extent that such deferment involved deterioration of the structure and thus imposed a cumulative burden on the landlord, allowance should be made for it; but held that Petitioners had not proved the extent of it.

Petitioners disagree seriously with the conclusions of the court below on these two points. In view, however, of the character of the reasons which this Court regards as sufficient for a favorable exercise of its discretion in the granting of certiorari, Petitioners do not seek review of those questions here.

Both of the points just adverted to are, in fact, relatively unimportant to the questions which we do here present. In the first place, on the Administrator's own unadjusted figures, the returns on the investment of the industry as a whole are grossly inadequate. Acceptance of Petitioners' contentions on weighting and deferred maintenance would have simply made the showing that much worse. For example, the return on 1944 investment, after fixed charges, would have been only .12%, and that on the landlords' equity on that basis only .36%. But the unadjusted figures

are quite bad enough to present the point. In the second place, the Court below decided the questions which we do here present as a matter of law. It would have made no difference to its decision whether the figures showed net returns on 1944 investment as 3%, zero, or a deficit, so long as the net operating income* of 1944 was commensurate with that of 1939.

This is not a case where the evidence has been weighed and a conclusion reached that a certain return is a fair return. The Court below refused to decide the question at all, on the ground that under the terms of the Act itself the question was irrelevant. The questions presented on this petition, therefore, raise no issue of fact; they are solely questions of law.

Specification of Errors to Be Urged

The Emergency Court of Appeals erred:

1. In interpreting the Emergency Price Control Act as authorizing the Price Administrator to establish maximum rents which prevent the rental housing industry in a defense-rental area from receiving a fair return on its investment.

2. In not holding that the Emergency Price Control Act as so interpreted is violative of the Fifth Amendment to the Constitution.

Reasons for Granting Writ

The Court below has decided important questions of federal law which have not been, but should be, settled by this Court.

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*"Net operating income", the determinative used by the Court below, as explained *supra*, p. 8n, is not to be confused with net return on investment. The Court below did not even require that net return on investment be commensurate with that of 1939; it simply required that the dollar amount of the net operating income, that is, the differential between rental income and operating expense, in 1944 be commensurate with the dollar amount of such net operating income in 1939.

This case was the first in which even the Emergency Court of Appeals decided these questions. The Regional Rent Executive of the Office of Price Administration called the decision "the most far-reaching of all rent control rulings" (New York Herald Tribune, August 27, 1946). It is a test case, the final determination of which will govern the administration of the Emergency Price Control Act in any defense-rental area where neither the net return of landlords during rent control nor that realized by them in the pre-war period, was an adequate return on their investment.

Even as applied to the New York City defense-rental area itself, the decision produces consequences of the utmost gravity and importance. Out of a total of 14,476,005 rental dwelling units in the entire United States registered with the Office of Price Administration on June 30, 1944, there were 1,946,219 units registered in New York City alone as of April 30, 1944 (R., Court's original opinion). Respondent stated in his original brief in the Court below (p. 1) that this case "involves the maximum rents for approximately 15% of all rental housing subject to rent control in the United States." The total assessed value of residential real estate in the New York City defense-rental area exceeds $8,700,000,000 (R., Tr. Part I, 26).

The judgment of the Court below dooms this vast industry to operations yielding grossly inadequate return on investment over an indefinite period of time, thus impairing its ability to respond to post-war needs and destroying all incentive, and indeed ability, to produce the large volume of new housing accommodations which is so urgently needed by the community.

Conclusion

Because of the importance of the federal questions presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1946

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

References to the opinions of the Court below and the grounds of jurisdiction as well as a statement of the case and specification of errors to be urged are contained in the petition and will not here be repeated.

I.

THE EMERGENCY COURT OF APPEALS ERRED IN INTERPRETING THE EMERGENCY PRICE CONTROL ACT AS AUTHORIZING THE PRICE ADMINISTRATOR TO ESTABLISH MAXIMUM RENTS WHICH PREVENT THE RENTAL HOUSING INDUSTRY IN A DEFENSE-RENTAL AREA FROM RECEIVING A FAIR RETURN ON ITS INVESTMENT.

The opinion below says "that the Emergency Price Control Act does not *in terms** require that maximum rents shall be so fixed as to assure an adequate fixed return on the investment in rental housing accommodations". That is true. It is equally true that the Act does require that maximum rents be "generally fair and equitable", and that it nowhere specifies "in terms" that the sole determinative test of that requirement is that net operating income sometime after the imposition of rent control compares favorably with that of a base year prior to the onset of defense activities.

Section 2(b) of the Act requires not only that maximum rents be "generally fair and equitable", but also that they "will effectuate the purposes of this Act". The purposes of the Act, as set forth in Section 1(a) thereof, are, among others, "to prevent *speculative, unwarranted* and *abnormal* increases in prices and rents", "to eliminate and prevent *profiteering*" and "to prevent a post-emergency collapse of *values*". To this the Price Control Extension Act of 1946 (Public Law 548, 79th Congress, 2nd Session), in Section 1A, added the "purposes and policies in the transition period" which include "making possible

*All italics in quotations are ours.

a successful transition to a peacetime economy of maximum employment, production, and purchasing power under a system of free enterprise".

The purposes stated in the original Act were not only negative but positive. The negative ones were directed against "speculative", "unwarranted" and "abnormal" increases in rents, and against "profiteering". Certainly to stabilize maximum rents at a level no higher than needed to permit a fair return on investment value would be wholly consonant with those purposes. The positive purpose was directed at prevention of "a post-emergency collapse of values", which is wholly consistent with the purpose stated in the Extension Act for the transition period. To freeze rents indefinitely at a level wholly inadequate to enable the industry to maintain itself and provide resources sufficient to meet the demands of the post-emergency period, with its inevitable increases in costs of building and operation, is the last way to accomplish this objective. Such a course hastens, rather than retards, a collapse of real estate values.

This Court has held that the use by Congress of the phrase "just and reasonable" in a regulatory statute (which phrase, we submit, is equivalent in meaning to "fair and equitable" in the Act here in question) implies a requirement that the rate will permit a fair return, even where the statute, like this one, does not "in terms" so require. In *Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944), involving the federal Natural Gas Act (52 Stat. 821), this Court said (p. 603):

> "By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be *sufficient* to assure *confidence in the financial integrity* of the enterprise, so as to *maintain its credit* and to *attract capital.*"

It is true that the system of price and rent control established by the Act here in question was not to be per-

manent. But the legislative history of the Act makes it quite clear that Congress intended that the phrase "generally fair and equitable", which it used with respect to both prices and rents, also implied a fair return.

In preparing the price control bill Congress relied heavily upon the proposals of Leon Henderson, then Administrator of the Office of Price Administration and Civilian Supply, who subsequently became the first Price Administrator under the Act. Mr. Henderson as the first witness before the House Committee stressed the necessity of permitting industries to earn a return sufficient, in the words of Woodrow Wilson, to "sustain the industries concerned in a high state of efficiency, provide a living for those who conduct them, enable them to pay good wages, and make possible the expansion of their enterprises * * *" (House Committee on Banking and Currency, Hearings on H.R. 5479 (superseded by H.R. 5990), 77th Congress, 1st Session, (1941), page 11). This language was subsequently adopted by members of the Committee and was reiterated by Mr. Henderson (Hearings on H.R. 5479 (superseded by H.R. 5990), *supra,* pages 825, 103, 890). And it is apparent that the standards for fixing prices were also intended to apply to rents (House Report No. 1409, 77th Congress, 1st Session (1941) page 4). During the legislative hearings Congress discussed the problem of permitting a fair return to each individual landlord as opposed to the industry in general and concluded that to provide a fair return for each individual would be administratively impractical (Hearings on H.R. 5479 (superseded by H.R. 5990) *supra,* pp. 455, 962, 964). But clearly throughout the legislative hearings on the Act and also in the opinions of the Emergency Court of Appeals, prior to the instant case, it was taken for granted that the statutory standard requires that industry as a whole be permitted to earn a fair return on investment.

Until its decision in the instant case, the Emergency Court of Appeals had not only recognized this requirement, but in stating it had used language strikingly similar to the

test which Mr. Henderson, adopting the words of Woodrow Wilson, expressed to the committee of the House. In *Madison Park Corp.* v. *Bowles,* 140 F. (2d) 316, 323-324 (1943), that court said:

> "In the legislative history of the Act there is further guidance as to the meaning of the words 'generally fair and equitable'. From discussions of the legislation before its enactment, it appears the intention was to permit business a *yield or profit sufficient for its sustenance in a state of efficiency and for reasonable development and expansion.*"

The court reiterated that holding in *Equitable Trust Co.* v. *Bowles,* 143 F. (2d) 735, 742 (1944). In *Chatlos* v. *Brown,* 136 F. (2d) 490 (1943), the Emergency Court of Appeals found that net operating income in the Bridgeport, Connecticut, Defense-Rental Area had greatly increased under rent control and then said (p. 496):

> "* * * The record is bare of any showing that complainant and other landlords in the area are not earning under rent control a *fair return on their investments.*"

In *Madison Park Corp.* v. *Bowles, supra,* the Court did add by way of dictum that "the discussions [in the Congress] indicate it was believed these objectives *usually* will be attained by permitting profits which the industry was willing to accept prior to defense activities." But a *belief* that this will be true in the *usual* case cannot properly be regarded as any qualification of the basic Congressional intent to permit a "yield or profit" sufficient for the "sustenance" of the industry "in a state of efficiency" and for its "reasonable development and expansion". That applies equally in the unusual instance where the "yield or profit", or net return on investment, prior to defense activities was itself insufficient to meet these objectives. In such instances, maximum rents which did no more than duplicate the inadequate yield of pre-war years would be no more consonant with the basic intent of Congress than would maximum rents which reduced an adequate pre-war rent

level to the point where it did not permit a sufficient yield under that test. The record in this case shows that New York City does present the unusual situation above referred to.

In 1939 the rental housing industry in New York was still under the blight of a severe real estate depression which had begun several years before and which had persisted for several years thereafter.

On May 3, 1933, the Legislature of the State of New York declared the existence of a public emergency with relation to real estate, stating:

> "* * * rental values have declined so sharply that it is impossible in many cases for owners of real estate to meet their obligations on * * * bonds, mortgages, or other security. * * * Numerous defaults aggregating millions of dollars have occurred in the payment of interest and principal on such mortgage investments and on the bonds, mortgages and other security against which such mortgage investments have been issued; and widespread additional defaults are likely to occur therein" (Mortgage Moratorium Act, Laws of New York, 1933, Chapter 745).

On May 26, 1939, the Legislature of New York declared that the above emergency "still continues and that it may reasonably be expected to continue to and including the first day of January, nineteen hundred and forty-one" (Mortgage Moratorium Extension Act, New York Laws of 1939, Chapter 524).

The report of the Joint Legislative Committee on mortgage moratorium and deficiency judgments made to the New York Legislature on January 31, 1938 (New York Legislative Document (1938), No. 58, pp. 32-33) concluded "that the emergency period declared by the Legislature to exist still exists" and reported:

> "It is apparent that many owners of real estate are unable at the present time to meet the obligations of the mortgages on their property. Defaults are numerous and immediate liquidation of a substantial amount of these mortgages through foreclosure or other court proceedings would so demoral-

ize the general real estate market that there would be realized on such bonds and mortgages substantially less than the face amount thereof and substantially less than would be realized if they were disposed of in an orderly manner over a reasonable period of time.

"*Business conditions are much worse than a year ago.* The cost of living has gone up, employment has decreased, stock quotations disclose a tremendous shrinkage, *there is no active real estate market other than a buyers' market,* and there is no immediate sign of improvement. There has been a heavy increase in unemployment and the number upon the relief rolls. There can be no question but that the emergency exists and will continue to exist for a long time in the future. * * *"

Judicial notice may be taken of the fact that New York is the only state which still has a moratorium on mortgages. In March, 1944, the Home Owners' Loan Corporation stated that the losses on their properties in New York State were higher than anywhere in the country (R. Tr., Part I, 103-104). In 1939 real estate in Manhattan was selling at only 75.5% of its assessed value. That was a condition even more serious than that which obtained in the two preceding years. In 1937 the proportion of consideration in open market sales to assessed valuation was 82.9% and in 1938, 79.5% (R. Tr., Part I, 5, 34-35, 99-100). Under the law of New York, assessed value should represent "the price at which the property would sell under ordinary circumstances" (*People ex rel Parklin Operating Corp.* v. *Miller,* 287 N. Y. 126, 129).

The Superintendent of Insurance in his annual report to the Legislature, dated August 15, 1940, devoted a special section to the problem of insurance companies holding real estate among their assets. In the year 1939 life insurance companies admitted to do business in New York owned $438,252,976 of New York State real estate. (Compiled from the Annual Report of the Superintendent of Insurance, New York Insurance Report Vol. I, (1940)). The Superintendent of Insurance reported that "* * * In 1935

there was practically no net income [on such real estate]; in 1936 it was nine-tenths of 1 per cent; in 1937, 1.6 per cent, and in 1938, 1.5 per cent." (New York Insurance Report, Vol. I, *supra,* p. 43a)*.

The report of the Joint Legislative Committee on mortgage moratorium and deficiency judgments made to the Legislature under date of February 24, 1942 (New York Legislative Document (1942) No. 45), contained the following information with respect to real estate held by savings banks in New York on October 31, 1940 (p. 23):

> "During the year 1939, 3,843 parcels of real estate held by the savings banks of the State were classified as unproductive and resulted in a net loss of $2,418,000. All of the properties held by all of the savings banks in the year 1939 [book value $304,395,098] resulted in a net loss of $741,000."

In New York the condition of the real estate rental market worsened, rather than improved, with the coming of war in Europe and the onset of emergency defense preparations here. That is shown by the following tabulation (R. Supp. Tr., Part I, 242):

ACTUAL FIGURES** FROM JUNE 1945 SURVEY
(1939 = 100)

Item	1939	1940	1941	1942	1943	1944
Scheduled Income***..	100.0	99.8	99.1	98.7	98.4	98.2
Net Rental Income....	100.0	98.8	96.8	97.6	99.9	103.3
Operating Expenses ..	100.0	101.0	101.7	102.1	104.7	103.9
Net Operating Income	100.0	95.4	89.0	90.6	92.5	102.3

*We understand that the returns on real estate reported by the Superintendent of Insurance were based upon the net income *before* depreciation or interest as related to the value of the properties.

**After statistical weighting of these figures, the net operating income of 1944 was shown to have been 1.4% below that of 1939 (R. Supp. Tr., Part I, 261). After both weighting and adding to operating expenses a proper reserve for deferred maintenance, net operating income for 1944 was shown to be only 90.7% of that of 1939, a decrease of 9.3%.

***"Scheduled Income" shows the level of rents actually charged; that is, the rental income which the properties would have produced if fully occupied at the rents actually charged or scheduled for each apartment.

New York City is primarily a commercial and financial, rather than industrial, center. The effect of defense activities was not stimulative, but depressive. Its population from 1940 to 1943 declined rather than increased (R., Tr. Part II, 4). It had no influx of war workers. In fact, the War Manpower Commission consistently classified it as a labor surplus area (R. Tr., Part I, 31, Office of War Information Release PM 4644, August 1, 1944). Until considerably beyond the maximum rent date, March 1, 1943, there was no general housing shortage (R. Tr., Part I, 30). The chief effect of defense and war activities upon landlords in New York City was to increase their operating costs, without raising the level of rents.

Indeed, the level of rents actually charged by landlords in New York City (that is, the "scheduled income" as defined *supra*, p. 20n) was less at and after the maximum rent date than that which obtained even under the depressed conditions of 1939. The following tabulation, covering the 50,129 units in the Administrator's survey, (R. Tr., Supp. Part I, 241) graphically portrays this decrease:

Year	Scheduled Income
1939	$28,965,176
1940	28,900,635
1941	28,695,675
1942	28,592,671
1943	28,489,483
1944	28,449,560

The course of the real estate rental market in New York City, as above portrayed, was the opposite of that which obtained in other cities in the country for which statistics are available. As to them there is nothing to indicate that the returns during the pre-war years, and especially 1939, were not satisfactory. Moreover, in those cities the effect of defense and war activities was to stimulate the rental market; and, before the maximum rent dates which were fixed when rent control was imposed upon

them, the landlords' net operating income had risen to levels far higher than those of 1939. In Kansas City net operating income after one year of rent control was 210.1 with 1939 as the base year of 100. In Seattle it was 158.7; in San Diego, 167.4; in Detroit, 128.9; in Minneapolis, 116.4; in San Francisco, 111.8. In twenty-five cities used as a cross-section by the Administrator in hearings before the House Committee on Banking and Currency (H. R. 4376, U. S. House of Representatives, 78th Cong., 2d Sess., Vol. 1, Chart 23, p. 1282), it averaged 126.8. In thirty-six cities other than New York, all under rent control, subsequently studied by the Administrator, he reported that net operating income for apartment houses had increased from a base of 100 in 1939 to 136 in 1944 (Rental Housing Operation under Rent Control in Thirty-six Cities, 1939-1944, Office of Price Administration Financial and Statistical Analysis Branch, Rent Department, January, 1946). In New York, after eight months of rent control, it was only 95.48 even on an unadjusted basis, that is, without weighting and with no reserve for deferred maintenance. On such unadjusted basis (*supra*, p. 20), it was only 102.3 at the end of 1944, despite the attainment by that time of practically 100% occupancy.

The only authority relied on by the Court below for its conclusion that the sole requirement of the Act was that the net operating income of the industry be the equivalent of that realized before the war emergency, was its former decision in *Wilson* v. *Brown,* 137 F. (2d) 348 (1943). That case involved an entirely different question. That was whether every individual landlord must be assured a fair return on the fair market value of his particular housing accommodations. The complainants in that case (137 F. (2d) p. 350) made no claim that the established maximum rents in Chicago were not "*generally* fair and equitable". The apartment building which they owned had passed through an abnormal transition with the result that, while at the time rent control was imposed their rentals were normal and reasonable, they were abnormally depressed at

the earlier date which the Administrator selected as the maximum rent date, to the levels of which rentals were rolled back. Their complaint was that the adjustments of the maximum rents authorized by the Act were limited to factors "of general applicability", and that there was no provision for protecting individual landlords from losses due to such peculiar circumstances.

Wilson v. *Brown* presented no substantial question of interpretation. The language of the Act was plainly against the complainant's contention, and the reports of the committees of Congress, and the other items of legislative history cited by the Court, showed conscious intent on the part of Congress that the Act should not guarantee a profit to each individual landlord. As the Court said: "Necessarily, a nation-wide regulatory program of such vast proportions as contemplated would work hardship to some individuals affected. Congress was conscious of this inescapable by-product of war-time regulation" (*id.* pp. 350-351). The only substantial question was as to the power of Congress under the federal constitution. As to this the Emergency Court said (*id.* p. 352) that there had been no "taking" of the complainant's property in the constitutional sense, since the Act did not require the landlord to continue his property in the rental market, and the restriction on his use of it for such purposes was for a limited period. It said that "the only question remaining to the courts is whether Congress had any rational basis for its judgment that it would be administratively impracticable to operate a scheme of nation-wide rent regulation on the basis of assuring to each of many million landlords a fair return on the fair market value of his rented property"; and held (*id.* pp. 353-4) that the Administrator had made a sufficient showing that to provide such assurance would lead to such administrative complexities and burdens that national rent regulation would break down under their weight.

In the instant case the Court below said that these observations apply "with equal force" to the question of

interpretation here raised, that is, whether maximum rents may be deemed "generally fair and equitable" if they deprive the "landlords as a whole" of opportunity to receive a fair return on their investment. We submit that the Court's statement is a complete *non sequitur*. In the first place, no serious administrative burden would be involved in requiring maximum rents which would not prevent a fair return on an industry-wide basis. The return for a defense-rental area generally can be ascertained by statistical studies. The Administrator's settled practice has been to make periodic surveys of a 4% sample of the comparative net operating income of housing accommodations in the New York City Defense-Rental Area and in other defense-rental areas throughout the country. It would be a relatively simple matter for the Administrator in making such surveys to obtain, in addition to the operating figures, the investment and depreciation figures. Relating the total of net operating income less depreciation in such sample to the total of original investment less depreciation would readily indicate whether the industry as a whole is permitted to earn a fair return on investment.

Nor, on the question of interpretation, is there persuasiveness in the reasons which the Emergency Court in the *Wilson* case cited as indicating that no "taking" of property was contemplated by the Act. While it is true that the Emergency Price Control Act is denominated a temporary measure, nevertheless Congress undoubtedly contemplated that it would be in force for an indefinite time. The history of the District of Columbia Rent Law of 1919 and those of the New York rent law for World War I and New York's Mortgage Moratorium Act were ready examples. As a matter of fact, this Emergency Price Control Act has been in force now for four years, and has just been extended for a fifth. Nor should there be imputed to Congress the utterly unrealistic conception that landlords generally may avoid the consequences of the Regulation by taking their properties off the rental market. 92% of the dwelling units in the New York City Defense-Rental Area are in

New York City itself, and of the total number in the City 77.7% are tenant occupied (R. Tr. Part II, 60). Actually, by far the greatest number of rental accommodations affected by rent control in New York City are apartment house accommodations. Most of them carry substantial mortgages with heavy interest and amortization requirements. They are subject to heavy real estate taxes and insurance charges as well as expense of upkeep. No owner could withdraw such accommodations from the rental market without losing his property almost overnight. In a choice of evils, the lesser would be to continue his ownership, and operate at an annual loss made up from his own savings, even for a relatively long period. To withdraw apartment houses wholly from the rental market would be economic suicide.

It is submitted that Congress cannot properly be deemed to have intended that the entire rental housing industry in a great city should be doomed to an indefinite number of years of operating without reasonable profit. That would be no way "to prevent a post emergency collapse of values" (original Act, Sec. 1(a)); or to achieve "a successful transition to a peacetime economy * * * under a system of free enterprise" (1946 Extension Act, Sec. 1A(a) (1)). To relegate landlords as a whole to any such situation not only deprives an essential industry of the vitality required to meet post-war needs, but acts as a severe deterrent to the production of new rental housing accommodations the urgent necessity of which is universally recognized. It cannot be expected that new money will be invested in an industry wherein failure is well-nigh a certainty.

II.

THE EMERGENCY PRICE CONTROL ACT, AS INTERPRETED BY THE EMERGENCY COURT OF APPEALS, VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

On the constitutional question the court below satisfied itself by citing its former holding in *Wilson* v. *Brown*,

supra, that the Administrator was under no statutory "or constitutional" compulsion to provide that the maximum rents of "each individual landlord" afford him a fair return on the fair market value of his rental property, and by stating that the observations made in that case apply "with equal force" to the question raised by the failure of the Regulation to permit the "industry as a whole" to realize a fair return. The court below cited no other authority. The same failure to appreciate the vital difference between denial to an individual landlord of any right to charge rentals sufficient to yield a fair return, and the denial of such opportunity to the industry as a whole, characterizes the decision of the court below on the constitutional question as it did on the question of interpretation.

The fact that the questions involved in the two situations are not the same appears by clearly implied recognition in this Court's opinion in *Bowles* v. *Willingham,* 321 U. S. 503 (1944), decided some eight months after *Wilson* v. *Brown.* This Court (321 U. S. p. 517) cited and followed *Wilson* v. *Brown,* but, in its definition of the issue which was presented and decided, clearly indicated its disposition to limit its decision to the case before it. This Court described (*id.* pp. 516-17) the argument of Mrs. Willingham, the landlord, as being that Section 2(b) of the Act is unconstitutional *"because"* it requires maximum rents which are *"generally* fair and equitable"; "that a rental which is 'generally fair and equitable' may be most unfair and inequitable as applied to a particular landlord and that a statute which does not provide for a fair rental to each landlord is unconstitutional". This Court held (*id.* p. 518) that "it has never been thought that price-fixing, *otherwise valid,* was improper because it was on a class rather than an individual basis", citing as an example the fact that high-cost operators may be more seriously affected by price control than others. It said (*id.* p. 519): "We need not determine what constitutional limits there are to price-fixing legislation"; and concluded that in the stress of a great war effort, the nation is under no constitutional necessity of providing

a system of price control which will assure "each landlord" a fair return on his property.

This Court (*id.* p. 517) cited *Wilson* v. *Brown, supra,* for the statement that "It has been pointed out that any attempt to fix rents landlord by landlord as in the fashion of utility rates, would have been quite impossible"; and held that "such considerations of feasibility and practicality are certainly germane to the constitutional issue". As we have above pointed out, there is no impracticality in fixing maximum rents on a level which will not prevent landlords "generally" throughout the entire defense-rental area from receiving a fair return on their investment.

We submit that, with the justification of impracticality removed, a regulation which imposes maximum rents which will deprive an entire industry of all opportunity to realize a fair return on its investment is an arbitrary and capricious exercise of power, which offends the due process clause of the Fifth Amendment, even if it be assumed that no "taking" of property is accomplished.

It is clear, at least, that the constitutional question thus raised was consciously left open by this Court in *Bowles* v. *Willingham, supra.* It is thus, like the question of the interpretation of the Act, an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Dated: New York, N. Y.
September 20, 1946.

APPENDIX

Pertinent Provisions of the Emergency Price Control Act of 1942.

Section 1 (a). It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

Section 2 (b). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particu-

lar defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within such defense-rental area. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. Whenever the Administrator shall find that, in any defense-rental area or any portion thereof specified by him, the availability of adequate rental housing accommodations and other relevant factors are such as to make rent control unnecessary for the purpose of eliminating speculative, unwarranted, and abnormal increases in rents and of preventing profiteering, and speculative and other disruptive practices resulting from abnormal market conditions caused by congestion, the controls imposed upon rents by authority of this Act in such defense-rental area or portion thereof shall be forthwith abolished; but whenever in the judgment of the Adminis-

trator it is necessary or proper, in order to effectuate the purposes of this Act, to reestablish the regulation of rents in any such defense-rental area or portion thereof, he may forthwith by regulation or order reestablish maximum rents for housing accommodations therein in accordance with the standards set forth in this Act. (As amended June 30, 1944).

Section 2 (c). Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order. (As amended June 30, 1944).

Section 204 (d). Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and

orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Price Control Extension Act of 1946 (Chapter 671, Public Law 548, 79th Congress, Second Session, July 25, 1946).

Section 3. Title I of the Emergency Price Control Act of 1942, as amended, is amended by inserting after section 1 thereof a new section as follows:

"PURPOSES AND POLICIES IN THE TRANSITION PERIOD

"Sec. 1A. (a) OBJECTIVES.—The Congress hereby affirms—

"(1) that because of abnormally excess spending power in relation to the presently available supply of commodities, rapid attainment of production equal to the public demand is one of the necessary and urgent objectives for the prevention of inflation and for the achievement of a reasonable stability in the general level of prices and rents, cost of living and costs of production (including labor costs), for the purposes set forth in section 1 of this Act and for the further purposes of protecting the real value of benefits provided by law for veterans and their dependents, of keeping faith with purchasers of United States War Bonds, and of making possible a successful transition to a peacetime economy of maximum employment, production, and purchasing power under a system of free enterprise; * * *"